

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

76-7190

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7190

WESTON FUNDING CORPORATION,

Plaintiff-Appellant,

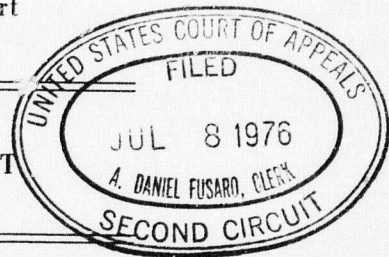
vs.

LAFAYETTE TOWERS, INC., a corporation of the State of
New Jersey, and GEORGE C. PECK,

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE PLAINTIFF-APPELLANT



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ISSUES PRESENTED

1. Is the action of Weston Funding Corporation based on the letter agreement of November 1, 1973, barred by the doctrine of res judicata?

2. Does the doctrine of collateral estoppel preclude Weston Funding Corporation from asserting the inapplicability of N.J.S.A. § 45:15-3 to the present action?

3. Is the claim of Weston Funding Corporation in quantum meruit barred by the doctrine of res judicata?

STATEMENT OF FACTS

This is an action for brokerage commissions by Weston Funding Corporation (hereinafter at times referred to as "Weston Funding"), a New York corporation, against LaFayette Towers, Inc. ("Lafayette"), a New Jersey corporation, and its sole shareholder, George C. Peck ("Peck").

On November 1, 1973, Weston Funding and Lafayette and Peck executed a contract whereby the latter parties gave to Weston Funding the exclusive right and authorization for a period of seven days to obtain a standby commitment for end loans in the total sum of \$4,500,000 with respect to a building project, Lafayette Towers, located at 180 Lafayette Avenue, Passaic, New Jersey. The contract was executed at the offices of Weston Funding in New York, New York. Under the terms of the contract, Weston Funding was to receive a commission of 3 1/4% of the total commitment, payable when the commitment was issued.

Weston Funding was not able to raise the money in seven days and at the end of that period the authorization to obtain the loan commitment was orally extended. In February, 1974, Weston Funding was successful in locating a source for the loan and obtained a written commitment from the First National State Bank of New Jersey. Under the

terms of the contract, Weston Funding's commission became due at this time.

Subsequently, on February 25, 1974, Weston Funding prepared written memorandum letter which confirmed that the commission was owed by Lafayette and Peck. This paper was signed by Peck on behalf of himself and Lafayette at a meeting in New Jersey. A check in the sum of \$25,000 was, at that time, delivered to Weston Funding in part payment of its commission. Lafayette and Peck have since refused to pay the balance due on the commission for its services. The loan commitment obtained by Weston Funding was subsequently used by Lafayette and Peck as a credit reference in obtaining a loan from another source on more favorable terms.

PROCEDURAL HISTORY

On May 21, 1974, plaintiff filed a complaint in the United States District Court for the District of New Jersey (Civil Action No. 74-746), seeking recovery for the balance due on the commission for its brokerage services in the amount of \$166,250. On June 22, 1974, the defendants filed an answer and a counterclaim. Thereafter, the defendants moved for summary judgment on September 21, 1974. This was granted on November 6, 1974, by Judge James A. Coolahan on the ground that the policy of a New Jersey statute (N.J.S.A. § 45:15-3), allowing only brokers licensed in New Jersey to bring suit for commissions in the courts of that state, would be given effect in a federal court sitting in New Jersey in a diversity case. At this time only the paper signed by the defendant on February 25, 1974, in New Jersey was before the court. The plaintiff, although registered as a real estate broker in New York, is not so licensed in New Jersey.

Plaintiff filed a notice of appeal from the grant of summary judgment, but thereafter, on March 18, 1975, the parties stipulated to a voluntary dismissal of the appeal.

The present action (No. 75 Civ. 1305) was begun in the United States District Court for the Southern District of New York in May, 1975. The plaintiff herein seeks recovery of the balance owed to it for its services on the basis of

the contract with the defendants executed on November 1, 1973. In the alternative, the plaintiff seeks recovery of the reasonable value of its services on the ground of quantum meruit. Defendants filed an answer to the plaintiff's complaint and thereafter moved for summary judgment. On March 9, 1976, Judge Robert L. Carter granted the defendants' motion for summary judgment on the ground that the plaintiff's present claim was barred by virtue of the doctrine of res judicata. The plaintiff herein appeals the grant of summary judgment in favor of the defendants.

ARGUMENT

I.

THE ACTION OF WESTON FUNDING CORPORATION
BASED ON THE LETTER AGREEMENT OF
NOVEMBER 1, 1973, IS NOT BARRED BY THE
DOCTRINE OF RES JUDICATA.

The basic principles of res judicata are well established. Thus, to assert this doctrine as a bar to an action one must show that a prior adjudication arising out of the same transaction was decided on its merits. Secondly, one must show that the cause of action in a subsequent action is identical to the cause of action in prior litigation. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Herendeen v. Champion International Corp., 525 F.2d 130, 133 (2d Cir. 1975); Restatement of Judgments § 61. It is Weston Funding's contention that neither of these requirements are present in the instant case.

A.

The Prior Judgment In The United States
District Court For The District Of New Jersey
Did Not Decide The Present Case On Its Merits.

It is clear that when the right to enforce an otherwise valid contract by civil action is suspended by a state statute, an action to enforce the contract may be

maintained in another jurisdiction or in a federal court sitting in diversity. David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489 (1912). The Supreme Court modified its prior decision in David Lupton's Sons and in Angel v. Bullington, 330 U.S. 183 (1947), to the extent that the Court determined that a federal court sitting in the state where the right to enforce a remedy has been abolished must act as if it were a court of that state. See Woods v. Interstate Realty Co., 337 U.S. 535 (1949). However, Angel v. Bullington left open the possibility that a federal court sitting in another jurisdiction may hear a substantive claim, enforcement of which is barred by a state statute. See 1 B Moore's Federal Practice ¶ 0.409[2] at p. 1018.

Judge Coolahan's grant of summary judgment for the defendants in the Weston Funding action in the United States District Court for the District of New Jersey merely gave effect to the strong New Jersey policy enunciated in N.J.S.A. § 45:15-3 which, in pertinent part provides:

No person, firm, partnership, association or corporation shall bring or maintain any action the courts of this State for the collection of compensation for the performance of any of the acts mentioned in the article without alleging and

proving that he was a duly licensed real estate broker at the time the alleged cause of action arose.

Summary judgment for the defendants in the New Jersey action was thus in accord with the Supreme Court's decision in Angel v. Bullington and Woods v. Interstate Realty Co., supra. However, by its terms, N.J.S.A. § 45:15-3 does not destroy an unlicensed broker's cause of action, but merely prevents him from bringing an action to enforce it in the courts of New Jersey. In this way it is similar to the statute involved in David Lupton's Sons and Woods, supra.

Contrary to Judge Carter's reading of that decision, Judge Coolahan's opinion in the New Jersey action did not reach the merits of Weston Funding's case because the New Jersey statute is merely a precondition to maintaining an action in the New Jersey courts or in the federal court in New Jersey sitting in a diversity action. It has been said of N.J.S.A. § 45:15-3 that, "It leaves little room to question the legislative intent to make licensing a condition precedent to the institution of suit for the recovery of a brokerage commission." Stahl v. Township of Teaneck, 162 F. Supp. 661, 667 (D.N.J. 1958) (emphasis added).

It is well established that where a judgment for the defendant results from a failure by the plaintiff to satisfy

a precondition to the bringing of an action, the judgment has not been reached on the merits. Costello v. United States, 365 U.S. 265 (1961); Saylor v. Lindsley, 391 F.2d 965 (2d Cir. 1968); Warner v. Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933). In Costello, the dismissal of the government's case in a denaturalization proceeding for failure to file an affidavit of good cause was held to be not an adjudication on the merits. Similarly, in Saylor, the dismissal of a derivative action for failure by the plaintiff to post bond for costs was deemed not to be on the merits. And in Warner, the dismissal of an action on the basis of a statute of limitations was held not to be on the merits for the purpose of the doctrine of res judicata in a subsequent action in a federal court sitting in another forum. The prior adjudications in Costello, Saylor and Warner were held not to be on the merits because the failure of the plaintiffs' to meet the preconditions to bringing an action prevented the courts from reaching the substance of their claims.

The requirements of N.J.S.A. § 45:15-3 is no less a precondition than were the requirements which the plaintiffs initially failed to meet in the decisions referred to above. Comment a to section 49 of the Restatement of Judgments states:

Judgment not on the merits. A judgment for the defendant is not on the merits

where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment determines that the plaintiff has no cause of action, it is on the merits; but if it determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits. If the defendant, whether on demurrer, motion, verdict or otherwise, obtains judgment in his favor on a ground not involving the substance of the plaintiff's cause of action, the cause of action is not extinguished thereby. This is the case, for example, where the judgment is based on the lack of jurisdiction of the court over the defendant or over the subject of the action, on the plaintiff's lack of capacity to sue, on the pendency of a prior action, on the misjoinder or nonjoinder of parties or on the misjoinder of causes of action.

(Emphasis added). See Restatement (2d) Conflicts, § 110, Comment a.

When a statute such as the New Jersey statute in the instant case removes a plaintiff's capacity to sue in the courts of that state, the failure of the plaintiff's action because he did not meet the requirements of the statute cannot be viewed as having been on the merits.

B.

The Present Cause Of Action Based On The Contract Of November 1, 1973 Differs From The Action Brought In The United States District Court For The District of New Jersey.

The inapplicability of the doctrine of res judicata to the present case may also be grounded on the fact that this case presents a different cause of action than the one filed in the United States District Court for the District of New Jersey, even though it involves the same general subject matter. See, e.g., Herendeen v. Champion International Corp., supra; McNellis v. First Federal Savings & Loan Association, 364 F.2d 251 (2d Cir. 1964).

As this court noted in Herendeen, a number of factors may be taken into consideration in determining whether successive actions are the same:

Most frequently cited as the relevant criteria by both this court and the New York Courts are [1] whether a different judgment in the second action would impair or destroy rights or interests established in the first action, [2] whether the same evidence is necessary to maintain the second cause of action

as was required in the first, and
[3] whether the essential facts and
issues in the second were present in the
first.

525 F.2d 133-34. See also McNellis v. First Federal Savings
& Loan Association, supra; Schuykill Fuel Corp. v. B. & C.
Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929);
Restatement of Judgments §§ 61-63.

It is Weston Funding's contention in the instant
action that its claim based on the November 1, 1973 contract
comports with these considerations. It is to be noted that
this contract which was extended by the oral agreement of the
parties was not before the court in the New Jersey action.
In that case, the subsequent memorandum of February 25, 1974,
confirming the plaintiff's right to a specific dollar value
in commissions was the basis on which recovery was sought.
It did not, however, constitute a contract as does the
November 1, 1973 agreement.

Since the subject of the New Jersey action did
not involve a contract, there is no opportunity for an
adjudication in the present case to impair or otherwise affect
rights or interests established in that action. In any case,
the application of N.J.S.A. § 45:15-3 in the New Jersey action
prevented the establishment of any substantive right with
regard to the validity or invalidity of the contract.

Similarly, new evidence in the form of the November 1, 1973 contract and the facts and circumstances surrounding its execution must be introduced in the present action. The foundation of Weston Funding's cause being based on an entirely separate incident from that considered in the prior action, it follows not only that new evidence is required to maintain the present action but that the facts and issues have been substantially changed.

Under these circumstances, Weston Funding submits that its present cause of action is separate and distinct from the cause of action sought to be maintained in the District of New Jersey. It follows that application of the doctrine of res judicata in the present case would be inappropriate.

II.

THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT
PRECLUDE WESTON FUNDING CORPORATION FROM
ASSERTING THE INAPPLICABILITY OF N.J.S.A.
§ 45:15-3 IN THE PRESENT ACTION.

In Part III of his decision granting summary judgment for the defendants in the present action, Judge Carter ruled that the application of N.J.S.A. 45:15-3, quoted in part supra, to the prior litigation would be controlling throughout any subsequent litigation between the parties as a matter of collateral estoppel. The apparent import of this statement is that the application of the New Jersey statute would bar any future contractual claims by Weston Funding arising out of its brokerage services provided to the defendants. Judge Carter also appears to suggest that Judge Coolahan made a decision as to the choice of law to be applied in the prior action and that this choice is binding on all subsequent litigation.

There are two reasons why the doctrine of collateral estoppel is not applicable in the present action so as to bind the parties with respect to the applicability of N.J.S.A. § 45:15-3 of New Jersey law in general. The first reason is simply that the issue of what law is to be applied to the contract of November 1, 1973, was not decided in Judge Coolahan's opinion. According to Section 68 of The

Restatement (Second) of Judgments § 68 (Tentative Draft) cited by Judge Carter:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See Restatement of Judgments § 68-72. As indicated in Part II, supra, however, the contract of November 1, 1973, was not before the court and no determination could be made as to what law should have applied to it. Thus, crucial questions such as whether the execution of the contract in New York provided sufficient contacts with that jurisdiction in order to justify the application of its law were left unreached.

The second reason why Judge Coolahan's decision as to the binding effect of the New Jersey statute is not applicable in the present case is that that decision was rendered as a deferral to the New Jersey policy of closing its courts to unlicensed brokers. As such, Judge Coolahan's decision was in accord with Angel v. Bullington, supra. However, it does not appear anywhere in Coolahan's opinion that the decision to declare invalid the contract was made on the basis of an application of the substantive contract law of New Jersey.

Even if it could arguably be said that it is not clear whether Judge Coolahan's decision to foreclose the plaintiff's action in New Jersey was based on Angel v. Bullington or on a choice of law, collateral estoppel would not be apposite to the present case. Collateral estoppel is appropriate Only where it is clear what was essential in the prior adjudication. Ungar v. Mandell, 471 F.2d 1163 (2d Cir. 1972); Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691 (S.D.N.Y. 1971). Where, as in the instant case, it is arguendo unclear as to the basis for a court's decision in a prior adjudication, relitigation of the issue purportedly decided should not be barred.

III.

THE PRIOR JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DOES NOT BAR THE PRESENT CLAIM OF WESTON FUNDING CORPORATION IN QUANTUM MERUIT.

In the event that the present action on the contract should not be allowed to go forward, Weston Funding's right to maintain an action for the reasonable value of his services should not be prejudiced. In Meirick v. Wittemann Lewis Aircraft Co., 98 N.J.L. 531, 121 A. 670 (E. & A. 1923), the Court of Errors and Appeals held that, even though a prior case asserting the plaintiff's right to recovery under an express contract of employment had resulted in a verdict for the defendant, res judicata would not prevent the plaintiff from maintaining a second action in quantum meruit for the reasonable value of his services. The court's rationale was that there were two distinct causes of action. Thus, it stated:

In the first suit a specific contract was alleged as the basis of a recovery. In the present suit a recovery is sought for services based on a quantum meruit. There is no identity of the thing sued for in each suit.

12 A. at 671. See also Kirkpatrick v. McElroy, 41 N.J.E. 539, 7 A. 647 (1886).

New York appears to follow a rule similar to that in Meirick. Thus, in Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953), plaintiff's cause of action on an express contract was dismissed for failure to comply with the statute of frauds. A second action based on a contract of partnership resulted in a directed verdict for the defendant. The maintenance of a third action on the basis of quantum meruit, however, was held to be permissible in spite of the defendant's assertion of res judicata. The court's analysis was limited to establishing the non-identity between the second and third actions brought by the plaintiff. However, citing Restatement of Judgments § 65, comment j, it appears to have approved the concept of allowing a new action in quantum meruit after an adverse judgment in an action on express contract. Thus, comment j notes that when a plaintiff receives an adverse judgment on a contractual claim he is not precluded from bringing an action for restitution or recovery of the benefit conferred. See Potter v. Emerol Manufacturing Co., 275 App. Div. 857, 89 N.Y.S.2d 67 (1949), where it was held that it is possible to draw a complaint in quantum meruit so as not to have such an identity with a cause of action based on an express contract of employment to be barred by res judicata.

In the present case an action in quantum meruit is distinguished from an action on the contract by the fact

that Weston Funding must prove that the services contracted for were actually performed. In addition, it must establish the dollar value of its services to the trier of fact. Neither of these elements are required in an action on the contract. The distinction between the two causes of action is thus established. Since both the New Jersey and New York courts would allow an action in quantum meruit under these circumstances, a federal court, sitting in one of these jurisdictions, should reach the same result.

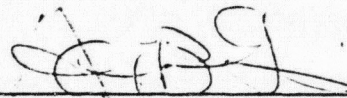
A further consideration which should compel a court to allow a quantum meruit claim is the substantial in justice which would be done to the plaintiff in this case if his claims on the contract and in quantum meruit are struck down. Thus, while Weston Funding will receive inadequate compensation for its efforts on behalf of Lafayette and Peck, the latter two will have been unjustly enriched by accepting the benefit of those efforts without paying just compensation for them.

CONCLUSION

In the light of the foregoing considerations
Weston Funding Corporation respectfully requests that
substantial justice will be done if the order of summary
judgment for the defendants is reversed and its action
is allowed to proceed.

Respectfully submitted,

By

A handwritten signature in dark ink, appearing to read 'A. B. Gins', is written over a horizontal line.

ALBERT B. GINS
Attorney for Plaintiff-Appellant

2 Copies Received
Date July 8, 1976
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By max zucker